Supreme Court, U.S.
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No. 99-1379

IN THE

Supreme Court of the United States

CIRCUIT CITY STORES, INC.,

Petitioner,

v.

SAINT CLAIR ADAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interest of Amicus Curiae	1
Summary of Argument	1
Argument	3
I. The Court Of Appeals' Ruling is Inconsistent with Congressional Intent and This Court's Advocation of a "Federal Policy Favoring Arbitration."	3
A. Subsequent Legislation by Congress Presumes That Employment Disputes are Arbitrable Under the FAA.	5
II. This Court's Decisions with Respect to Workplace Disputes Favor Internal Employment Policies Designed to Prevent and Redress Problems Without Resorting to Judicial Intervention.	8
A. The Explosion of Workplace Litigation has Placed an Overwhelming Burden on the Courts.	8
III. If the Agreement at Issue is Deemed a Contract of Employment, the Court's Decision Will Jeopardize Other Longstanding Human Resource Policies and Practices.	12
Conclusion	15
Appendix — Statutes and Regulations Involved	1a

TABLE OF CITED AUTHORITIES

Page

CASES:

U.S. Supreme Court

Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987) 12

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) 10

Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985) 4

Dickerson v. United States, 120 S. Ct. 2326 (2000) 11

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 10

FDIC v. Meyer, 510 U.S. 471 (1994) 12

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 4, 7

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 5

Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) 10

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) .. 5

Page

Mitchell v. United States, 526 U.S. 314 (1999) ... 11

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) 4

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 4

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 4

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 8, 11

U.S. Courts of Appeals and District Courts

Asplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995) 3

Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996) 5

Circuit City v. Adams, 194 F.3d 1070 (9th Cir. 1999), *cert. granted*, 120 S. Ct. 2004 (2000) 13, 14

Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) 3

Dickstein v. DuPont & Co., 443 F.2d 783 (1st Cir. 1971) 3

Page

EEOC v. Frank's Nursery & Crafts, 966 F. Supp. 500 (E.D. Mich. 1997) 5

Hasham v. California State Bd. of Equalization, 200 F.3d 1035 (7th Cir. 2000) 9

Hutson v. McDonnell Douglas Corp., 63 F.3d 771 (8th Cir. 1995) 9

Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361 (7th Cir. 1999) 3

Matthews v. Rollins Hudig Hall Co., 72 F.3d 50 (7th Cir. 1995) 5

McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998) 3

Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) 3

Miller v. Public Storage Management, 121 F.3d 215 (5th Cir. 1997) 3

Modzelewski v. Resolution Trust Corp., 14 F.3d 1374 (9th Cir. 1994) 13

Page

Patterson v. Tenent Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) 3

Seus v. Nuveen & Co., 146 F.3d 175 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999) 3, 5

State Courts

Asmus v. Pacific Bell, 999 P.2d 71 (Cal. 2000) ... 12

STATUTES, REGULATIONS AND RULES:

The Federal Arbitration Act
9 U.S.C.A. §§ 1-14 (West 1999) 1

Labor Relations Management Act
29 U.S.C.A. § 185(a) (West 1998) 8

Civil Rights Act of 1964, as amended
42 U.S.C.A. § 2000e *et seq.* (West 1994) 5
42 U.S.C.A. § 2000e-5(b) (West 1994) 7

Americans With Disabilities Act
42 U.S.C.A. §§ 12101-12213 (West 1994) 7
42 U.S.C.A. § 12212 (West 1994) 7

Civil Rights Act of 1991
42 U.S.C.A. § 1981 (West 1994), Pub. L. No. 102-166, § 118, 105 Stat. 1071 6

Page

29 C.F.R. § 1601.20 (1999) 7

Supreme Court Rule 37.3(a) 1

Supreme Court Rule 37.6 1

LEGISLATIVE MATERIALS:

H.R. REP. NO. 68-96 (1924) 4

H.R. REP. NO. 102-40(II) (1991), *reprinted in* 1991 U.S.C.C.A.N. 694 6

S. REP. NO. 68-536 (1924) 4

110 CONG. REC. S7242 (1964) 6

110 CONG. REC. S11848 (1964) 6

137 CONG. REC. S15472 (1991) 6

TREATISES, ARTICLES AND OTHER PUBLICATIONS:

BLACK'S LAW DICTIONARY 525 (6th ed. 1990) 13

Employers Wage War of Workplace Lawsuits; Survey Reveals Trend Toward Prevention, PR Newswire Ass'n, Inc. (Nov. 11, 1998) 9

Page

Employment Bias Cases in Federal Court Almost Tripled in Previous Decade, Daily Lab. Rep. (BNA) (Jan. 20, 2000) 8

U.S. Equal Employment Opportunity Comm'n, *Charge Statistics FY 1992 through FY 1999* (visited July 18, 2000) <http://www.eeoc.gov/stats/> 8

INTEREST OF AMICUS CURIAE

The Society for Human Resource Management ("SHRM") submits this brief in support of Petitioner Circuit City.[1] SHRM is the largest human resource association in the world with over 140,000 professional members from all 50 states and 80 other countries; SHRM is the leading voice of the human resource profession. SHRM's mission is to lead, represent, guide, and inform human resource practitioners and others interested in human resource issues regarding matters of critical and strategic importance to the workplace.

SHRM members, probably more than any other association of professionals, will be responsible for designing and implementing arbitration programs, policies, and procedures that comport with the Court's decision.

SHRM welcomes the opportunity to file this brief to assist the Court's understanding of the enormous practical effect its decision will have in the workplace.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Ninth Circuit should be reversed. The Federal Arbitration Act, 9 U.S.C.A. §§ 1-14 (West 1999) ("FAA"), proclaims a liberal federal policy favoring arbitration of disputes. Section 1 of the FAA, however, excludes from its purview "contracts of employment of seamen, railroad employees, or any other class

1. Pursuant to Supreme Court Rule 37.3(a), *amicus* files this brief with the consent of the parties. Evidence of consent is filed concurrently with this brief. *Amicus* discloses pursuant to Supreme Court Rule 37.6 that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus curiae*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

of worker engaged in foreign or interstate commerce." Every circuit court, other than the Ninth Circuit, has come to the conclusion that Section 1's exclusions were intended to apply only to a limited class of contracts: *i.e.*, contracts of those employees actually engaged in the movement of goods across state lines. SHRM urges this Court to follow the decisions of the majority of circuit courts.

Consistent with the intent and purpose of the FAA and subsequent legislation by Congress, agreements to arbitrate in the employment context are enforceable under the FAA. Further, empowering employees and employers to work together to prevent and resolve workplace disputes without judicial intervention has been the policy of Congress and this Court for the last seventy-five years. The Ninth Circuit's decision deviates from this long line of precedent and, therefore, should be overturned.

SHRM urges this Court to follow the recent, practical decisions endorsing and encouraging arbitration that it has developed over the past two decades. As set forth below, to affirm the Ninth Circuit would call into question the validity of the employment practices and policies developed and relied upon for decades.

Finally, the agreement to arbitrate at issue is set forth in a job application which the Ninth Circuit concluded, a fortiori, was a contract of employment. SHRM and its members are concerned that if a job application is considered an employment contract then other documents and agreements ancillary to the employment relationship also will be considered contracts of employment. If so, under the Ninth Circuit's reasoning, arbitration of these ancillary issues (which are longstanding practices in some instances) are unenforceable under the FAA. From a human resources perspective, sustaining the Ninth

Circuit's decision will change the landscape of how SHRM and its members apply these policies. SHRM believes this was neither the intent of Congress nor is it consistent with this Court's decisions encouraging arbitration.

ARGUMENT

I.

THE COURT OF APPEALS' RULING IS INCONSISTENT WITH CONGRESSIONAL INTENT AND THIS COURT'S ADVOCATION OF A "FEDERAL POLICY FAVORING ARBITRATION."

The Ninth Circuit's refusal to compel arbitration under the FAA contravenes Congressional intent favoring arbitration of employment disputes. It also is at odds with every other circuit court to consider this issue.[2]

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2. SHRM anticipates that the central issue as to the meaning, intent, and purpose of Section 1 of the FAA and, in particular, its exclusion of certain types of contracts will be briefed and argued by the parties. Accordingly, SHRM does not address this issue, but urges the Court follow the circuit court decisions holding that Section 1's exclusions were intended to apply only to a limited class of contracts: *i.e.*, contracts of those employees actually engaged in the movement of goods across state lines. *See, e.g., Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361, 363-64 (7th Cir. 1999); *Seus v. Nuveen & Co.*, 146 F.3d 175, 178-79 (3rd Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 575-76 (10th Cir. 1998); *Patterson v. Tenent Healthcare, Inc.*, 113 F.3d 832, 835-37 (8th Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1470-71 (D.C. Cir. 1997); *Miller v. Public Storage Mgt.*, 121 F.3d 215, 217-18 (5th Cir. 1997); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 596-601 (6th Cir. 1995); *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); *Dickstein v. DuPont & Co.*, 443 F.2d 783, 785 (1st Cir. 1971).

The purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (citations omitted). The FAA's legislative history demonstrates that the drafters intended to broaden the use of arbitration and protect agreements to arbitrate from the courts' "jealousy" for their own jurisdiction. *See* H.R. REP. No. 68-96, at 1-2 (1924) (the courts "refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction"); S. REP. No. 68-536, at 2-3 (1924) ("the jealously of their rights as courts, coupled with the fear that if arbitration agreements were to prevail and be enforced, the courts would be ousted of much of their jurisdiction").

In the seventy-five years since the FAA's enactment, its goal of eliminating judicial hostility towards arbitration has been achieved.[3] This Court, moreover, has encouraged "a federal policy favoring arbitration," *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)), and has held that courts must "rigorously enforce agreements to arbitrate" under the FAA. *See Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

3. *See, e.g., Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231-32 (1987) (the "mistrust of the arbitral process" has been undermined by recent arbitration decisions); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626-627 (1985) ("[w]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution").

A. Subsequent Legislation by Congress Presumes That Employment Disputes Are Arbitrable Under the FAA.

The Ninth Circuit's decision holds that even voluntary agreements to arbitrate between an employer and employee (presumably including agreements to arbitrate after a dispute arises) are unenforceable under the FAA. This holding patently is at odds with congressional intent permitting voluntary arbitration of civil rights claims.

Congress, in enacting legislation, is presumed to be aware of existing legislation. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 26 (1990); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). The enactment of employment discrimination statutes after passing the FAA indicates congressional intent to permit arbitration under these laws to be enforced pursuant to the FAA.

The amendment of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e-2000e-17 (West 1994) ("Title VII"), by the Civil Rights Act of 1991 ("CRA 1991"), demonstrates the acceptance and encouragement of extra-judicial resolution, and, specifically, arbitration.[4] Section 118 of the CRA 1991 states, "[w]here appropriate and to the extent

4. A number of lower courts have compelled arbitration, in part, on this basis. *See, e.g., Seus v. John Nuveen,* 146 F.3d at 182 (affirming decision compelling arbitration stating "the text of § 118 evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude such arbitration"); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881-82 (4th Cir. 1996) (the 1991 CRA and ADA "encourage[] arbitration"); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n.4 (7th Cir. 1995) (the CRA of 1991 "encouraged the use of arbitration to resolve ADEA claims"); *EEOC v. Frank's Nursery & Crafts*, 966 F. Supp. 500, 503 (E.D. Mich. 1997) (Congress has "evinced a specific intent to encourage arbitration of Title VII claims").

authorized by law, the use of alternative means of dispute resolution including, . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." Pub. L. No. 102-166, § 118, 105 Stat. 1071 (set forth in the notes following 42 U.S.C.A. § 1981 (West 1994)). Further, the legislative history states that:

> This section "encourages" the voluntary use of conciliation, mediation, arbitration and other methods for resolving disputes under Civil Rights laws governing employment discrimination.
>
> We agree that voluntary mediation and arbitration are far preferable to prolonged litigation for resolving employment discrimination claims.
>
> . . .
>
> We recognize that mediation and arbitration, knowingly and voluntarily undertaken, are the preferred methods of settlement of employment discrimination disputes.

H.R. REP. NO. 102-40(II), at 78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 764. Similarly, it was stated at the Senate hearings that "where the parties knowingly and voluntarily elect to use these methods," arbitration would be encouraged. 137 CONG. REC. S15472, S15478 (statement of Sen. Dole) (1991).

Title VII's legislative history, moreover, indicates that the Equal Employment Opportunity Commission ("EEOC") was created to mediate claims and, thus, forego the need to resort to the courts. *See* 110 CONG. REC. S11848 (1964) (statement of Sen. Humphrey) (the EEOC would be created "to investigate complaints and to bring about voluntary settlement"); 110 CONG. REC. S7242 (1964) (statement of Sen. Case) ("much may be

accomplished in achieving fair employment opportunities through the wise and imaginative exercise of persuasion, mediation, and conciliation"). A ruling that does not uphold arbitration may dampen the trend by the EEOC, employers, and lower courts for finding alternative dispute resolution, such as mediation, conciliation, and arbitration as alternatives to court.

The regulations governing Title VII further demonstrate the reliance on settling cases through extra-judicial methods. *See* 29 C.F.R. § 1601.20 (1999) (encouraging settlement prior to issuing a determination). Even when the EEOC finds reasonable cause to believe a violation of the anti-discrimination laws has occurred, Title VII expressly requires it to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C.A. § 2000e-5(b) (West 1994).

The Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101-12213 (West 1994) ("ADA"), also specifically encourages parties to use extra-judicial methods of resolving disputes: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter." *Id.* § 12212.

It is clear that under Title VII and the ADA parties may voluntarily agree to arbitrate.[5] Assume an employer and employee agree, after a dispute arises, to resolve the matter through arbitration. After three days of arbitration can one party "pull out," believing the arbitration is going poorly, to try anew

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5. In *Gilmer*, this Court found that claims under the Age Discrimination in Employment Act also were arbitrable. *See* 500 U.S. 20.

before a judge or jury? If not, under what law will arbitration be compelled? Title VII and the ADA do not confer specific jurisdiction on the federal courts to enforce agreements to arbitrate.[6] Thus, Congress understood and presumed that another vehicle existed to compel arbitration: *i.e.*, the FAA.

II.

THIS COURT'S DECISIONS WITH RESPECT TO WORKPLACE DISPUTES FAVOR INTERNAL EMPLOYMENT POLICIES DESIGNED TO PREVENT AND REDRESS PROBLEMS WITHOUT RESORTING TO JUDICIAL INTERVENTION.

A. The Explosion of Workplace Litigation Has Placed an Overwhelming Burden on the Courts.

In the past decade, the number of employment discrimination cases filed in federal court has nearly tripled. *See Employment Bias Cases in Federal Court Almost Tripled in Previous Decade*, Daily Labor Rep. (BNA) A-1 (Jan. 20, 2000) (the number of employment cases filed in federal courts between 1990 and 1998 jumped from 8,413 to 23,735); *see also* U.S. Equal Employment Opportunity Comm'n, *Charge Statistics FY 1992 through FY 1999* (visited July 18, 2000) <http://www.eeoc.gov/stats/> (77,444 discrimination charges were filed with the EEOC in 1999).

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6. In contrast, Congress conferred specific jurisdiction for the federal courts to enforce contracts between an employer and a labor organization representing employees, including jurisdiction to enforce arbitration provisions contained in collective bargaining agreements. *See* Labor Relations Management Act § 301, 29 U.S.C.A. § 185(a) (West 1998); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957) (holding that Section 301(a) of the LMRA authorizes federal courts to enforce agreements to arbitrate).

It is improbable that the threefold increase in filings of employment discrimination claims has been caused by a threefold increase in discriminatory conduct by employers over the past eight to ten years. To the contrary, empirical evidence suggests that in today's tight labor market, employers are doing everything possible to attract and retain workers, including the creation of human resource procedures designed to encourage fairness in the workplace. *See Employers Wage War of Workplace Lawsuits; Survey Reveals Trend Toward Prevention*, PR Newswire Ass'n, Inc. (Nov. 11, 1998) (86% of U.S. Companies have created written human resource policy manuals; 63% have implemented training programs for managers and supervisors; 57% have developed employee grievance policies; 51% have hired human resource managers and 48% have purchased employment practices liability insurance).

The increase in federal filings reflects a growing demand by employees to have a neutral party review their employers' decisions. Employers, in turn, want to provide employees with fair alternatives to redress workplace problems, without resorting to the courts. Arbitration achieves this end.

The deluge of employment litigation has caused some on the federal bench to note that their purpose is not to serve as "super personnel departments." *Hasham v. California State Bd. of Equalization*, 200 F.3d 1035, 1048 (7th Cir. 2000) ("this Court has consistently avoided stepping into the role of a super-personnel department"); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995) ("this case appears to be precisely the type of employment dispute that this Court has repeatedly stated is not covered by the discrimination laws. . . . [T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel

departments"). To quell the clamor for judicial intervention into workplace disputes and to provide employers with an incentive to better manage their workplace, this Court has articulated that the law favors the institution of fair and reasonable preventative policies and procedures.

For example, in *Kolstad v. American Dental Ass'n*, this Court ruled that an employer that trains its work force regarding discrimination may avoid liability for punitive damages. *See* 527 U.S. 526, 545 (1999). Specifically, with regard to punitive damages, the Court stated, "an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good-faith efforts to comply with Title VII.' " *Id.* (citation omitted).

The Court also effectively has encouraged employers to create internal grievance procedures to redress issues of sexual harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998) ("It would . . . implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations [of Title VII] and give credit here to employers who make reasonable efforts to discharge their duty"); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (a defending employer may raise an affirmative defense by showing that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise").

The establishment of alternative dispute resolution programs, including arbitration, works in conjunction with these decisions to further encourage and reward employers and, in

particular, direct their human resource departments to take steps to correct workplace discrimination without judicial intervention. The logical extension of these decisions, coupled with the Court's decades-long encouragement of arbitration, is to recognize arbitration as a viable and fair means of resolving workplace grievances.[7] A contrary conclusion will unravel well-established arbitration programs, as well as other employment policies and procedures.[8] SHRM, therefore, urges the Court to reverse the Ninth Circuit.

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7. More than 40 years ago, this Court ruled that an agreement to arbitrate grievances was *quid pro quo* for an agreement by a labor organization (and its members) not to strike. *See Lincoln Mills*, 353 U.S. at 455. Since this ruling, "wild cat" strikes virtually have disappeared, arguably giving the United States greater labor peace than any other nation. In contrast, the United States has more employment-based (non-union) litigation than any other country. What has worked so well in one area of employment relations (those with unions and employers) can work equally well if arbitration between employers and non-union employees is permitted.

8. The Supreme Court has, in other areas of the law, considered whether wide-spread acceptance to a practice is reason to sustain the practice. *See, e.g., Dickerson v. United States*, 120 S. Ct. 2326 (2000) ("We do not think there is such justification for overruling Miranda. Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture"); *Mitchell v. United States*, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting) (noting that the fact that a rule has found "'wide acceptance in the legal culture'" is "adequate reason not to overrule" it).

III.

IF THE AGREEMENT AT ISSUE IS DEEMED A CONTRACT OF EMPLOYMENT, THE COURT'S DECISION WILL JEOPARDIZE OTHER LONGSTANDING HUMAN RESOURCE POLICIES AND PRACTICES.

The FAA does not define the phrase "contract of employment."[9] Nor does the FAA's legislative history shed clear light on the meaning of this phrase. As a general matter of statutory construction, absent a definition, a word or phrase in a statute is given its plain and ordinary meaning. *See, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (stating that the term "cognizable" was not defined under the Federal Tort Claims Act and therefore the ordinary meaning of the term shall be construed); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 552-53 (1987) (determining that the statutory language at issue was plain and nothing in the statute contradicted this plain meaning).

The plain and ordinary meaning of a "contract of employment" is one where one party agrees to employ the other and the other party agrees to such employment.[10] Respondent completed an employment application containing a provision

9. SHRM understands that the Court did not grant certiorari on the issue of whether a contract of employment exists, however, amicus believes there are serious issues which may impact on the field of human resources should the Ninth Circuit's ruling be affirmed.

10. Even in an employment contract that is terminable at will, one party agrees to employ the other (albeit for an indefinite period) and the employee agrees to being employed. *See, e.g.*, *Asmus v. Pacific Bell*, 999 P.2d 71, 80 (Cal. 2000) (a " 'specified condition' may be one for either definite or indefinite duration").

entitled "Circuit City Dispute Resolution Agreement" ("DRA"). *See Circuit City v. Adams*, 194 F.3d 1070, 1071 (9th Cir. 1999), *cert. granted*, 120 S. Ct. 2004 (2000). The DRA specifically states: "I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me. . . . [and] this Agreement in no way alters the 'at-will' status of my employment." *Id.* at 1071.

While the parties validly agreed to arbitrate future disputes between them in the employment application, Adams did not agree nor was he bound to work for Circuit City. Likewise, Circuit City did not agree to hire Adams. Absent either party agreeing to work for the other, the document in question cannot be considered a "contract of employment"; no employment relationship was established by the job application.

The Ninth Circuit opined that the plain and ordinary meaning of the phrase "contract of employment" could be found by looking to its own precedent, which cited BLACK'S LAW DICTIONARY's definition of an employment contract. *See Adams*, 194 F.3d at 1071 (citing *Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374, 1376 (9th Cir. 1994) (quoting BLACK'S LAW DICTIONARY 525 (6th ed. 1990)). The full citation, which the Ninth Circuit did not provide, reads: "An agreement or contract between employer and employee in which the terms and conditions of one's employment are provided." BLACK'S LAW DICTIONARY 525 (6th ed. 1990).

The circuit court, however, failed to state how the facts of this case apply to the above definition where the job application containing the agreement to arbitrate was devoid of any of the essential terms and conditions of employment. The employment application containing the agreement to arbitrate fails to evidence an agreement even to the most rudimentary terms and conditions of employment: *i.e.*, the employee's rate of pay or position.

Thus, applying the "dictionary" meaning to the phrase "contract of employment," the job application at issue simply is not an employment contract because it fails to set forth crucial terms and conditions of employment.

Employers and employees (or job applicants) routinely enter into valid agreements which are not contracts of employment: *e.g.*, agreements to adhere to work safety rules; to comply with certain human resource policies and procedures; to submit to pre-employment and post-accident drug and alcohol tests; to keep certain business information confidential; and to restrict the employee's post-employment conduct. Many of these agreements contain provisions permitting arbitration of disputes which arise in these limited areas. The Ninth Circuit's decision suggests that any type of agreement between an employee and an employer, *a fortiori*, is a contract of employment. SHRM disagrees. The Ninth Circuit's holding in *Adams* calls into doubt whether any of these ancillary employment issues could be subject to arbitration, thus requiring employers to re-evaluate virtually all of their employment policies.

CONCLUSION

For the foregoing reasons, *amicus curiae* Society for Human Resource Management respectfully requests this Court to reverse the decision of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX — STATUTES AND REGULATIONS INVOLVED

29 U.S.C. § 185

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce s defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

42 U.S.C. § 2000e-5(b)

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management

committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the ''respondent'') within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done

during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

42 U.S.C. § 12212

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

Appendix

29 C.F.R. § 1601.20(a)

Prior to the issuance of a determination as to reasonable cause the Commission may encourage the parties to settle the charge on terms that are mutually agreeable. District Directors, Area Directors, Local Directors, the Program Director, Office of Program Operations, Director of Systemic Programs, Office of Program Operations, or Directors, Field Management Programs, Office of Program Operations, or their designees, shall have the authority to sign any settlement agreement which is agreeable to both parties. When the Commission agrees in any negotiated settlement not to process that charge further, the Commission's agreement shall be in consideration for the promises made by the other parties to the agreement. Such an agreement shall not affect the processing of any other charge, including, but not limited to, a Commission charge or a charge, the allegations of which are like or related to the individual allegations settled.